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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ABNER HAYNES LISTER,

Defendant and Appellant.

D059734

(Super. Ct. No. SCD225290)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

Abner Haynes Lister entered into a plea agreement in which he pled guilty to possession of marijuana for sale (Health & Saf. Code, § 11359). The agreement included a stipulated sentence and the dismissal of the other charges and the three alleged prison priors. Prior to pleading guilty, Lister requested replacement of appointed counsel, which request was denied following a closed hearing. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). Lister was later permitted to represent himself and made a motion to

withdraw his guilty plea. That motion was denied and Lister was sentenced in accordance with the plea agreement. Lister filed a timely notice of appeal and the trial court issued a certificate of probable cause. (Pen. Code, § 1237.5.)

Lister contends the trial court erred in denying his motion to replace appointed counsel and abused its discretion in denying his motion for a continuance of the hearing on his motion to withdraw his guilty plea. Neither contention has merit. We will affirm the judgment.

STATEMENT OF FACTS

Since this is an appeal following a guilty plea, a formal statement of facts is unnecessary. It is sufficient to note that Lister sold a small quantity of marijuana and cocaine base to an undercover San Diego Police officer.

DISCUSSION

I

DENIAL OF THE MARSDEN MOTION

Lister contends the trial court erred in denying his motion to replace appointed counsel and that the denial of the motion rendered his subsequent guilty plea involuntary. The Attorney General responds that the denial of the *Marsden* motion is not cognizable on appeal when the denial is followed by a guilty plea. In any event, respondent argues the court properly denied the motion. We agree with the respondent on both points.

A. Legal Principles

A defendant is not entitled to choose appointed counsel, but where the defendant demonstrates that counsel is not providing adequate assistance or that there exists some irreconcilable conflict that will impair representation, the defendant is entitled to the appointment of new counsel. (*People v. Welch* (1999) 20 Cal.4th 701, 728.) When a defendant requests that appointed counsel be relieved, the trial court is obligated to make a reasonable inquiry as to the source of the problem and to decide whether counsel should be replaced. (*Marsden, supra*, 2 Cal.3d 118; *People v. Molina* (1977) 74 Cal.App.3d 544, 549.) We review a trial court's decision to deny a "*Marsden* motion" under the abuse of discretion standard. (*People v. Earp* (1999) 20 Cal.4th 826, 876.)

In ruling on a motion to relieve counsel the trial court must consider the reasons offered by the defendant and make an inquiry of defense counsel in order to assess the nature of any conflict. In the last analysis, however, disagreements over trial tactics are not the basis for finding irreconcilable conflicts. (*People v. Welch, supra*, 20 Cal.4th at pp. 728-729.) Trial counsel is the person responsible for making all but a few of the tactical trial decisions. (*People v. Carpenter* (1997) 15 Cal.4th 312, 376.) The fact that the defendant does not wish to follow counsel's advice or chooses not to listen to counsel does not require the trial court to replace counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 606; *People v. Clark* (2011) 52 Cal.4th 856, 918.)

B. Analysis

The *Marsden* motion was made by Lister after the court and the parties had been in extensive plea negotiations. The parties had agreed to a plea to the possession for sale count, a stipulated sentence of 365 days in local custody, and a stayed three-year prison term.

Lister had not been willing to discuss his options with counsel. He would not answer whether he wanted to go to trial or to plead guilty. When he finally decided to talk, Lister said he did not want to go to trial but wanted a better deal, which the prosecutor rejected. Lister said he wanted to file motions to get counts dropped, or priors stricken, but counsel would not do that.¹ The court then held an in camera hearing with Lister and defense counsel to consider Lister's complaints.

During the closed hearing the trial court heard Lister's complaints and defense counsel's extensive response. It is clear from the record that counsel had effectively worked on Lister's behalf. Lister did not want to return to prison so it was important for counsel to determine if Lister's parole officer was going to seek to revoke Lister's parole. Counsel contacted the parole agent and determined that he would not seek to revoke Lister's parole. When counsel advised Lister of that development, Lister demanded a better "deal" from the prosecutor, which was refused.

¹ Ironically, the plea agreement which counsel had negotiated, and to which Lister ultimately agreed, included striking his three prison priors.

Counsel reviewed the possible motions that might have been available to Lister, but gave a detailed explanation as to why he rejected each of them. Lister was not deterred by counsel's advice and reasoned that since he did not have much chance of winning at trial they should file some undefined "motions." At the conclusion of the hearing, the court determined there had not been a breakdown in the attorney-client communications, but that Lister simply did not want to listen to sound advice.

Although the court did not address Lister's comments about counsel not wanting to represent him or that counsel was demeaning, it is clear from the lengthy discussions that counsel was doing a thorough and professional job representing an uncooperative client.

As we have noted, under the *Marsden* line of authority, the trial court has broad discretion to grant or deny a motion to relieve appointed counsel. This record clearly demonstrates that after careful review of the issues the trial court properly exercised its discretion in denying Lister's request.

Regarding the question of whether the *Marsden* issue is cognizable on appeal, we agree with the respondent that Lister gave up the *Marsden* issue by pleading guilty. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786.) Lister argues that denial of a request to relieve counsel is cognizable after a guilty plea where the denial of the motion is integral to the change of plea. However, Lister has not shown that his decision to plead was driven by the denial of his motion to change counsel. Mere reluctance to plead, is not a basis for invalidating the plea. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919.) Lister made it clear throughout the numerous plea discussions that he did not want

to go to trial. He was instead pressing for the best deal he could get. When the negotiations were complete, he did get the best deal available, and avoided the revocation of his parole. Based on the record before us, we agree with the respondent that the entry of the guilty plea makes the denial of the *Marsden* motion not cognizable on appeal.

II

DENIAL OF THE MOTION FOR A CONTINUANCE

After his guilty plea, Lister requested and was granted the right to represent himself. He thereafter filed a motion to withdraw his guilty plea. His request for 30 days in which to prepare for a hearing on the motion was granted. Shortly before the scheduled hearing Lister filed a request for another continuance in order to prepare for his motion. After review by the trial court the requested continuance was denied. The court then heard argument on the motion and Lister's request to withdraw his guilty plea was denied.

Lister contends the trial court violated his due process rights by denying his request for a continuance. He does not, however, directly challenge the denial of his motion to withdraw his guilty plea.

A. Standard of Review

Trial courts have broad discretion to grant or deny motions to continue criminal cases. The trial court's decision will not be overturned on appeal in the absence of a clear showing of abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

When we review a decision to grant or deny a motion to continue we review the factors considered by the trial court. Those factors include the reasons for the request, the diligence of the party requesting the continuance, whether any new evidence sought is material, the amount of time that might be required to obtain any new evidence, and " ' "above all, whether substantial justice will be accomplished or defeated by a granting of the motion." ' " (*People v. Jenkins, supra*, 22 Cal.4th at p. 1037.) The presence or absence of prejudice is an important factor in weighing a decision to deny a continuance. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

B. Analysis

Lister's request for a continuance was based on two principal grounds, the need for further discovery and the need to develop material to show he was not able to understand the proceedings because of medication he was taking. Lister proposed to have a "psych" evaluation done on himself and sought his medical records to show the medication he was allegedly taking at the time of his plea. In the discussions about his request the court noted it had conducted an extensive inquiry of Lister, under oath, at the time of the plea. At the time of his plea Lister testified he had not taken any medication, that he understood his rights, had enough time to consult with counsel, and that all of his questions had been answered. In his motion, Lister claimed he made such statements because his attorney told him he had to do so in order to get the plea bargain.

With regard to the request for discovery, Lister sought a tape recording of his interview with a detective, however, it was established at the time of the continuance

motion that the defense had already received the recording, and that there was only one such recording. Thus, there is no abuse of discretion shown for rejecting Lister's request on this ground.

Lister's major point was he was medicated and did not know what was going on at the time of the plea. He wanted time for an evaluation and for him to receive his medical records. However, as we have noted, Lister had already testified, under oath, he had not taken any medication prior to the plea. Further, in his moving papers, Lister did not inform the court of when he began taking medication or for how long he had taken it. The trial court could reasonably conclude Lister would know when and what medication he had been taking at the time of the plea. Further, the court could discount Lister's new claim that he had lied under oath at the direction of counsel, yet he did not understand what was happening when he testified.

In this case the trial court had seen Lister on several occasions. The court had discussed the plea negotiations with him and discussed his concerns in the *Marsden* motion. The court observed Lister at the change of plea, where the court thoroughly explored the nature of the guilty plea process, and Lister's rights and the consequences of the plea. Under the circumstances of this case, the court could reasonably conclude that Lister's request for a continuance was not justified and would not produce anything material to the issues the court would be called upon to decide. Given the court's knowledge of Lister and his mental state at the time of the plea, it could reasonably conclude no purpose would be served by further delay. Most importantly, Lister has not

demonstrated any prejudice from the court's denial of his request for a continuance. (*People v. Samayoa, supra*, 15 Cal.4th at p. 840.) Nor has Lister shown any likelihood that the continuance would have provided him with anything that would have risen to the level of good cause to set aside his plea. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

The trial court did not abuse its discretion when it denied Lister's request to continue the motion to withdraw his guilty plea. Likewise, there was no denial of Lister's due process rights.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.